

STATE OF MICHIGAN
COURT OF APPEALS

INTERIOR/EXTERIOR SPECIALIST
COMPANY,

UNPUBLISHED
January 8, 2009

Plaintiff-Appellee,

v

DEVON INDUSTRIAL GROUP, LLC,
SEABOARD SURETY COMPANY, and
AMERICAN HOME ASSURANCE COMPANY,

No. 276620
Wayne Circuit Court
LC No. 05-506508-CK

Defendants-Appellants.

Before: Schuette, P.J., and Zahra and Owens, JJ.

SCHUETTE, J. (*dissenting*).

I disagree with my distinguished colleagues in the majority, Judges Zahra and Owens. I believe that the trial court erred when it concluded that the May 4, 2006 waiver was not applicable to plaintiff's breach of contract and abandonment claims. Therefore, I would reverse and remand this case on that ground.

The waiver that plaintiff executed on May 4, 2006, provides as follows:

* * PARTIAL UNCONDITIONAL WAIVER OF LIEN * *

I/We have a contract with Devon Industrial Group to provide contract work for 9-1564-09 the improvement of the property described as SOUTHEASTERN HIGH SCHOOL and hereby waive my/our construction lien rights, rights against any payment bonds, and claims arising from the improvement, in the amount of \$1,142,354.91 for labor/material provided through 03-31-2004.

This waiver, together with all previous waivers, if any, does cover all amounts due to me/us for the contract improvements provided through the date as above.

Defendants moved for partial summary disposition, asserting that under the above waiver, defendants were entitled to dismissal of plaintiff's claims that related to any work

completed before March 31, 2004. The trial court denied defendants' motion, reasoning as follows:

THE COURT: Okay. Now, you're saying that – if I understand – that it doesn't matter if they still had amounts that were due and owing and unpaid, by signing this document they be operation of law lose their right to collect it.

MR. TEGER: They are saying that upon receipt of this payment -

THE COURT: No, just answer my question.

MR. TEGER: I believe the answer –

THE COURT: Don't – don't – it's a straightforward question.

MR. TEGER: I'm sorry.

THE COURT: You want to change the question. What you are telling me that even though before they signed this document, they had claims remaining in excess of the amount that's on the form. That by signing the form, their right disappeared, they don't have it anymore.

MR. TEGER: Yes, Your Honor.

THE COURT: What's the consideration for that?

MR. TEGER: Because what they are saying is that upon receipt of this amount of money, I have been paid in full for all the work to that date.

THE COURT: No, no, but – okay, all right, but it's false. My hypothetical – my hypothetical says that that statement is false. They're saying they got paid in full but they really have not. And I think what you are asking me to rule is that because they say they are paid in full, even though they haven't, when they sign the form they can't collect the remainder.

MR. TEGER: You're saying when they signed the form, they crossed their fingers. They didn't really mean it.

THE COURT: No, - well, we don't know. I don't know if they crossed their fingers or they made a mistake or they did it on purpose. I'm asking about your –

MR. TEGER: Yes.

THE COURT: - your – my hypothetical – okay, I'll take it, it's a mistake, let's say it's a mistake.

MR. TEGER: They have waived their claim, I agree, your hypothetical.

THE COURT: Okay. Well, I don't agree. I don't agree. So, I - the motion is denied.

Likewise, the trial court denied defendants' motion in limine regarding the waiver, and when defendants attempted to admit the waiver as evidence, the trial court refused, concluding that the waiver was not applicable to plaintiff's claims, reasoning as follows:

My ruling is this. That as a matter of law, this is nothing more than a receipt for the amount paid. . . .

Now, if you want to – I guess I can't stop the Defendant from claiming that when [plaintiff] signed this, they intended to forego every breach of contract. This is a breach of contract case is what it is. And this doesn't say anything about giving up, you know, the cause of action of breaches of contract.

* * *

So what I'm saying is that the likelihood that you're going to convince the jury . . . against [plaintiff's] absolute and utter denial is slim and none. So what we're going to end up doing is spending a couple of hours arguing about a point where you do not succeed as a matter of law, and it is all but impossible, unless [plaintiff's] going to admit that, you know, . . . when they signed this, they intended to give up any cause of action they had for breach of contract. It's not possible. It's a monumental waste of time.

* * *

And so my ruling is that [the waiver] doesn't preclude [plaintiff] as a matter of law, and that there are no facts that are ever going to make a jury issue on the claim that they intended to waive any claim for damages for breach of contract.

Defendants argue that the trial court erred in denying their motion for partial summary disposition, erred in denying their motion in limine, and erred in refusing to admit the waiver into evidence. I agree.

Michigan defines waiver as a “voluntary and intentional abandonment of a known right.” *Quality Products & Concepts Co, supra* at 374. Generally, contractual waivers of claims will be enforced where the waiver is fairly and knowingly made. *Skotak v Vic Tanny Int'l*, 203 Mich App 616, 618; 513 NW2d 428 (1994). Moreover, “[t]he fundamental goal of contract interpretation is to determine and enforce the parties’ intent by reading the agreement as a whole and applying the plain language used by the parties to reach their agreement.” *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007). Unambiguous contractual language must be construed and enforced as written. *Quality Products & Concepts Co, supra* at 375. A contract is ambiguous “when its provisions are capable of conflicting interpretations.”

Klapp v United Ins Group Agency, Inc, 468 Mich 459, 467; 663 NW2d 447 (2003) (citation omitted). “[T]he meaning of an ambiguous contract is a question of fact that must be decided by the jury.” *Id.* at 469.

Here, the trial court should have enforced the waiver of claims executed by IES and dismissed IES’s claims for work done before March 31, 2004. Its conclusion that the waiver did not apply to IES’s breach of contract and abandonment claims was erroneous because the waiver is unambiguous. While it is titled a “Partial Unconditional Waiver of Lien,” the language of the waiver went beyond a standard construction lien, see MCL 570.1115, and waived all “claims arising from the improvement.” This clause, coupled with the last sentence of the waiver, which states, “This waiver, together with all previous waivers, if any, does cover all amounts due to me/us for the contract improvements provided through the date as above,” makes clear that the parties’ intended to preclude recovery by IES for all claims that related to any work completed before March 31, 2004. Therefore, I believe that the trial court erred when it failed to grant defendants’ motion for partial summary disposition and defendants’ motions in limine, and when it failed to admit the waiver into evidence for consideration by the jury, and I would reverse and remand this case for further proceedings.

/s/ Bill Schuette